IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 494 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

LALAN AGENCY THRO'PARTNER SARDAPRABHA VALLABHBHAI PARIKH

Versus

CHANDRAKANT PURSHOTTAMDAS MEHTA

Appearance:

MR AJ PATEL FOR MR PR ABICHANDANI for Petitioner

MR PV NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 05/03/98

ORAL JUDGEMENT

1. This appeal is by the plaintiff, a registered partnership firm Shri Lalan Agency against the order dismissing notice of motion dated 4.9.1997 in Regular Civil Suit No. 2945 of 1995, pending in the Court of City Civil Judge at Ahmedabad.

2. The plaintiff filed the suit alleging that it is

engaged in the business of constructing, organising, developing and buying and selling of and all other dealings in connection with lands, buildings and other kinds of real estate. In the month of August 1993, Shri Kamlesh Parikh, who is an authorised representative of the plaintiff firm and looking after the business of the firm on being approached by one broker Shri Ramesh M. Gadhvi entered into an oral agreement to purchase with the defendant, who is the owner of the property situated in Gulbai Tekhra, Ahmedabad bearing Plot No.634 in Town Planning Scheme No. 3/6 situated in Kochrab area at Ahmedabad.

3. According to plaint assertions it was agreed between the parties that the said property comprising land admeasuring 1746 sq.mts. (2088 sq.yds) together with construction of Jyotirdip Bungalow therein be sold by the defendant to the plaintiff or its nominee at the rate of Rs.6591/- per sq.yd. and the plaintiff firm through its authorised representative Kamleshbhai Parikh agreed to purchase the said property. In pursuance of the said agreement, Rs.2,61,000/- were paid by cheque to the defendant on 24.9.1993 drawn on Kalupur Commercial Cooperative Bank Limited, Vikram Branch, Ahmedabad. The other terms of agreement were alleged to be that formal agreement for sale would be executed in favour of the plaintiff by the defendant upon defendant getting his title to the aforesaid property clear and marketable and on that the purchaser plaintiff firm will part with 20% of the total consideration of amount which is to be paid by the plaintiff to the defendant. It was also agreed that the said banakhat or agreement to sale was to be registered and as required under the provisions of the Income Tax Act will be filed by the parties before the concerned authorities within a period of 15 days from the registration of the aforesaid banakhat. It was also mutually agreed between the parties that the conveyance will be executed by the defendant after clearance by the Income-Tax authority under Section 269UC of the Income-Tax Act within six months thereof. In pursuance of this agreement the defendant entrusted the work of clearance of title in respect of the property in question to M/s. Jani and company, advocates and solicitors and through them got a public notice published inviting claims in respect to the said property in the local daily, Gujarat Samachar dated 4.10.1993. It was averred in the plaint that the communication and acceptance of the offer was very much complete on 24.9.1993 bringing in existence a binding contract between the plaintiff and defendant creating mutual obligations and reciprocal promises which both the parties were liable to honour.

Defendant has not yet been able to get title clearance certificate. On 1.5.1995 the plaintiff received under a registered letter a cheque of Rs.2,61,000/- from the defendant. The letter was addressed to Kamleshbhai Parikh with reference to which it was averred that Kamlesh Parikh, the alleged authorised representative of the plaintiff firm had no such authority whatsoever as referred in the above said letter by the defendant. Treating the return of Rs.2,61,000/- by the defendant as refusal to go ahead with the alleged oral agreement dated 24.9.1993, the present suit for specific performance of agreement has been filed. According to the plaintiff as on the date of filing of the suit, market price of the land in question was Rs.15,000/- per sq. mt. A notice of motion was also moved along with the plaint, and it was prayed that pending hearing and final disposal of the suit, the defendant be restrained from dealing with the suit property and from entering into any kind of transfer or alienation or parting with the possession of the suit property or any part thereof in favour of anybody else. The defendant was further required to be restrained from making any construction over the said property or encumber in any manner whatsoever. Ad-interim relief during the pendency of the notice of motion was also prayed for to the same effect. After service of notice, ad interim order directing the defendant to maintain status quo was made on 29.5.1995. The learned Judge after hearing the parties was of the opinion that plaintiffs have failed to make out a prima facie case in their favour of an oral agreement.

4. On that account and keeping in view that plaintiffs interest would otherwise be safeguarded by doctrine of lis pendens under Section 52 of the Transfer of Property Act dismissed the notice of motion and ad interim order was vacated on 4.9.1997. Aggrieved with the aforesaid order the plaintiffs have preferred this appeal.

5. Heard learned counsel for the parties.

6. The defendant has filed a written statement denying existence of any subsisting valid agreement between the plaintiff and himself. The defendant in his written statement has made it clear that there has been negotiations between himself and Kamlesh Parikh in respect of the land in question. He is also not denying receipt of Rs.2,61,000/- through a cheque from the plaintiff but in that respect it was specifically averred that the cheque in question was signed by Kamlesh Parikh as partner of the plaintiff firm. But he is not a

partner of the plaintiff firm and the plaintiff has no right and is not entitled to file the suit. According to the defendant, no broker was ever appointed by the defendant, as has been suggested by the plaintiff in his plaint. Kamlesh Parikh, who was otherwise known to the defendant as a regular customer of shop run by Kamlesh Parikh, had approached the defendant on his own about the property in question. Kamlesh Parikh gave a cheque of Rs.2,61,000/as deposit amount to show his bonafide as a serious party interested to buy the property. The price and other terms in respect of the property were to be settled after obtaining title clearance certificate by the defendant. The defendant denied that Kamlesh Parikh had agreed to purchase the suit property at the rate stated above. According to the defendant as on the date of the alleged agreement the market price of the property was much higher and sale agreement was only to be executed after title clearance certificate was obtained by the plaintiff after getting suit property cleared in all respects and specific term for the sale price and other terms were to be settled. However, in the later part of his pleadings, the defendant admits that the title clearance certificate was to be obtained by the defendant. Defendant also pleaded that the suit property originally belong exclusively to defendant, but he had gifted the suit property to HUF on 20.3.1993 and had paid necessary gift tax thereupon, from 203.1993. The suit property became property of HUF and was recognised as such for income tax and wealth tax purposes. The defendants HUF consists of himself, his wife and his three sons. Thereafter the property was partitioned amongst the members of HUF with effect from 1.4.93. The said partition is also recognised by the income tax authorities. A copy of order recognising the partition of the joint family under Section 171 of the Income Tax Act, 1961 was also annexed. As per the orders, the case of the defendants before the Income Tax authorities under application dated 24.12.1993, the immovable property had been partitioned amongst brothers and movables together with all the liabilities shall be taken by Shri Chandrakant Mehta. These facts according to that order was confirmed by other coparceners in that proceedings. Along with reply to notice of motion, copies of accounts making payment, bills of the municipal corporation in respect of the property tax relating to the property in question have also been filed presumably in support of the plea that property do not belong to the defendant Chandrakant P. Mehta but to his sons, who have been shown occupants of the property. On these pleadings, the defendant contested the notice of motion.

7. In support of plaintiffs application, two affidavits of the alleged brokers on behalf of the plaintiff and defendant respectively have also been filed. The learned City Civil Judge by his order in this appeal has dismissed the notice of motion as stated above.

8. It has been urged by the learned counsel for the appellant that the learned trial Judge has been unduly influenced by the fact that the affidavit of Kamlesh Parikh has not been filed, the fact which has been treated by the court to be fatal to the case of plaintiff for temporary injunction. According to learned counsel if the pleadings of the parties namely plaint and written statement are read in proper perspective, prima facie, plaintiff's case is made out that there did come an oral agreement in existence as alleged by the plaintiff. It is the further contention of the learned counsel for the appellant that learned trial judge also erred in drawing negative inference from the fact that trial court has found the title of the defendant defective on the basis of the order recognising partition with effect from 1.4.1993 by the Income Tax authorities under Section 171 of the Income Tax Act, and from the fact that only a paltry sum of Rs.2,61,000/- has been paid to the defendant against the purchase price of over Rs. 2.00 crores suggestive of the fact that no concluded agreement has come into existence between the parties. How much amount is to be treated as earnest money is matter of agreement between the parties. Its ratio may have relevance in considering whether entire deposit amount is to be considered as earnest or partly earnest and partly advance payment only, but cannot have relevance to question about existence of agreement. On this account also in drawing adverse inference against the plaintiff prima facie case, the trial court has erred.

9. Learned counsel for the respondent apart from supporting the order under appeal has further urged that from the pleadings of the parties it is apparent that there is no privity of contract between the plaintiff and defendant. Even assuming though not admitting that any concluded agreement came into existence on 24.9.1993, it was between the defendant and Kamlesh Parikh who purported to act as partner of the plaintiff firm. But since on their own showing Kamlesh Parikh is not the partner of the plaintiff firm, no privity of contract has been established between the plaintiff firm and the defendant, merely on the bald assertion of the plaintiffs that Kamlesh Parikh was acting as their agent.

10. From the pleadings of the parties, some salient features which emerge and about which there cannot be any dispute are that defendant had some negotiations about the sale of the property in question with Kamlesh Parikh on 24.9.1993 in pursuance of which the defendant was to obtain a title clearance certificate in respect of the property in his favour, and for which defendants solicitors put a public advertisement in Gujarat Samachar on 4.10.1993. The defendant accepted a cheque of Shri Lalan Agency signed by Kamlesh Parikh as partner of the firm for a sum of Rs.2,61,000/- which was duly honoured and remained with the defendant in the account of Shri Lalan Agencies until it was returned, to the plaintiff firm and was duly received by it though according to plaintiff the same has not been encashed by them so far. While the defendant claims that negotiations were absolutely between himself and Kamlesh Parikh, according to plaintiff, two brokers were present whose affidavits have been filed. According to the defendant, Kamlesh Parikh approached him claiming to be a partner of the firm Shri Lalan Agency. According to plaintiff he was acting only as an authorised representative of the plaintiff firm and he negotiated with the defendant on their behalf. The dispute in the aforesaid circumstances, on the question of completed agreement is only to the extent whether on 24.9.1993, the parties agreed to transact a sale in favour of the plaintiff firm, consideration for which had been determined, in respect of a duly identified property, and only a formal agreement was to be executed for the purpose of completing other formalities after title clearance certificate has been obtained or as per the say of the defendant it was only at the negotiation stage other terms have not been settled except that the defendant would get title clearance certificate and other terms would be settled only thereafter. Rs.2,61,000/- has only been kept as deposit as an assurance of bonafide on the part of the person with whom transaction was negotiated. About the second question whether there was any privity of contract between the parties, the issue hovers around the fact whether Kamlesh Parikh projecting himself as partner of the plaintiff firm and delivering a cheque on its behalf in such capacity has any effect on the substance of the case of the plaintiff once they own all the acts done by Kamlesh Parikh though not in his capacity as a partner but as their agent when in fact he is not a partner of the firm.

11. Both the learned counsel placed reliance on decision of Supreme Court in Kollipara Sriramulu v. T. Aswatha Narayana reported in AIR 1968 SC 1028. Learned

counsel for the appellant relies on this decision for the purpose of showing that a specific performance of an oral agreement, if it has been duly proved is permissible and a suit on the basis of oral agreement would not fail merely because parties to such oral agreement have expressed their desire to have a formal agreement drawn up later on. On the other hand, Mr. Nanavati appearing for the respondent defendant contends that since even as per the plaint allegation, a formal agreement detailing the terms and conditions of agreement to sale has to come in existence later on on fulfillment of such conditions, the oral agreement pleaded by the plaintiff at best can be treated an agreement to execute an agreement to sale in future as per the terms and conditions settled on fulfillment of the conditions but by itself is not a completed contract, which could be specifically enforced.

It was a case in which the appellant before the Supreme Court has filed a suit for specific performance against the partners of the firm known as Vasavamba Oil and Rice Mills claimed to have purchased 39 shares in the site in dispute, the first respondent has filed a suit for specific authorities of oral agreement dated 6.7.1952 in respect of those shares by alleging that all the partners of the firm except the appellant had agreed to sale 137 shares in the site and in pursuance of that oral agreement, partners who were owning 98 shares had executed sale deed in his favour and the other partner who owned 39 shares had not done so. He therefore claimed specific performance of the agreement. His suit was dismissed by the trial court on the ground that first respondent had not been able to prove oral agreement of sale in his favour, allegedly taken place on 6.7.1952. sale in his favour, alleged to have taken place on 6.7.1952. the oral agreement pleaded by the respondent was true and the appellant was not a bonafide purchaser for value without notice of the prior oral agreement and accordingly the suit for specific performance of the agreement was decreed. The contention raised was that oral agreement was ineffective because the parties contemplated the execution of a formal document, and because the mode of payment of the purchase money was not actually agreed upon. This plea was negatived. The Court opined:

"It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent

> the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case."

Thus in each case it is to be inquired into whether a completed oral agreement in respect of any transaction existed notwithstanding any stipulation of execution of a written agreement in future or such contract would come into existence only on execution of such agreement in the background and circumstances of each case.

On the facts of the case, the court opined:

"The question in the present appeals is whether
> the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of respondent No.1 does not show that the drawing up of a written agreement was a prerequisite to the coming into effect of the oral agreement."

About the fact that oral agreement did not prescribe for mode of payment of full consideration, the court held:

"The mere omission to settle the mode of payment
> does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed."

12. If we examine the facts of the present case to find out prima facie as to what was the intention of the parties when they spoke about execution of a formal agreement, it is to be seen that under what background the formal agreement was to be executed. The plaintiff has averred:

"It was further mutually agreed and decided
> between the parties in the abovesaid agreement that in view of the huge consideration money involved, the formal agreement for sale would be executed in favour of the plaintiff by the

> defendant upon the defendant getting his title to the aforesaid property certified to be clear and marketable and on that purchaser plaintiff firm will part with 20% of the total consideration amount which is to be paid by the plaintiff to the defendant."

This part of agreement during the negotiation with Kamlesh Parikh whether as a partner of the firm or as an agent of the plaintiff firm is not disputed by the defendant either. From the tenor of the this pleading it cannot be said that plaintiff treated him bound with the so called oral agreement, and to go ahead with whatever the title, the defendant possessed on the date when he entered into oral agreement. Binding contract was to come in existence when the title clearance certificate was obtained by the defendant. This oral agreement was never intended to be executed or carried through its logical conclusion until the title clearance certificate is made available to the plaintiff to its satisfaction. At least plaintiff was not bound to go ahead with the oral agreement in the absence of title clearance certificate. The fact that now the plaintiff wants to go ahead with such agreement without insisting on title clearance does not alter the situation. This clearly goes to show that the execution of agreement envisaged on a future date was not merely a formality to be gone through but was conditioned with further requirement that the defendant gets a title clearance certificate in respect of the property in question. That being so, in my opinion, the case prima facie would fall in the category where the agreement to execute a formal agreement in future is not merely desire to put details of the agreement in writing for future purpose, but it was an expression of agreement between the parties that a completed agreement to sale would come into existence only on production of title clearance certificate, until then, it stands at the stage of negotiations. It also stands to reason that unless the purchaser who is assured of title of the vendor he would not have entered into a concluded contract so as to bind himself. The fact that title was yet to be investigated does go to show that at least plaintiff has on that date was not fully assured about the defendant's title, and unless he got that assurance the question of his intention to bind himself by the agreement would not arise.

13. In this connection it is also to be noticed that defendant has pleaded categorically that the property was self acquired property until 23.3.1993 on which date by

his act whether of a gift or declaration of his intention, it became the property of his joint family consisting of himself, his wife and two sons and a partition of the entire joint Hindu family property including the property in question took place on 1.4.1993 which was duly recognised by the Income tax authorities, in the proceedings for the assessment year 1993-94 under Section 171 of the Income Tax Act, 1961. It is not to say that the admissions made before the Income tax authorities or orders made for the purpose of taxation under the provisions of relevant statute, are conclusive proof of facts emerging there from but it does make out a prima facie case that there was or there exists a fairly arguable dispute about the clear title of the defendant to pass the property to the plaintiff as per the oral agreement pleaded, giving credence to the prima facie conclusion to which I have reached that the intention of the parties to execute a formal agreement after the defendant is able to procure a title clearance certificate, militates against treating the outcome of negotiation dated 24.9.1993 as a concluded oral agreement for the sale of the property in question.

14. For the present purposes it will not be out of place to notice one salient feature that according to the plaintiff as on date when oral agreement has come into existence the price of the land was fixed at Rs.6591/per sq. yd. At the time of filing of the suit on 26.5.1995, the price of the land has shot up to Rs.15,000/- per square yard. He has parted with a sum of Rs.2,61,000/- in September 1993 and has chosen to ask for specific performance of agreement after the amount has been returned in May 1995. However, nothing tangible has been placed on record by the plaintiff that he has during this period taken any steps or did any acts to secure the execution of sale in his favour and only on failing which he pursued his remedies for getting this transaction completed with Court's intervention. The Supreme Court in K.S.Vaidynadam and others v. Vairavan reported in AIR 1997 SC 1751 held that while granting discretionary relief of specific performance :

> The rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties."

In the case before Their Lordships, the court

finding that the plaintiff was not diligent to pursue his remedy for specific performance of agreement within reasonable period and delay was coupled with substantial rise in prices between the date of agreement and the date of suit notice which brought about a situation where it would be inequitable to give relief of specific performance to the purchaser. The court vacated the decree passed by High Court for the specific performance of the agreement in question.

Admittedly, in the present case set up by the plaintiff he has entered in agreement on 24.9.93 at a consideration of Rs.6591/- per sq. yard and when the suit was filed after about 2 years the market price of the property was Rs.15000/- per sq. yard. If earlier fixation of price is considered the true reflection of market price on that date, it is clearly case of galloping inflation of price, during the inaction on the part of plaintiff, which will prima facie make the grant of relief of specific performance inequitable, keeping in view the ratio of K.S.Vaidyanathan's case (supra).

Even otherwise prima facie an agreement to sale of immovable property for consideration exceeding Rs.10.00 lacs cannot be specifically enforced until a registered written agreement of sale is executed at least 4 months prior to intended date of sale and is filed with competent authority under Section 269UC of Income Tax Act 1961, under Chapter XXC in form 37 and decision thereon is taken by the competent authority whether to purchase or not the said property. As has been held by Supreme Court in C.B. Gautam v. Union of India (1993) 1 SCC 78 that if in an agreement to sell immovable property the apparent consideration shown in the agreement to sell is less than the fair market value by 15% or more and presumption may be drawn that this undervaluation has been done with a view to evade tax such presumption though is rebuttable by leading evidence before the competent officer.

This makes the property liable to be subject to preempting purchase. The relevant date for market price and consideration so disclosed is the date of written agreement in which apparent consideration is incorporated. Without going into question whether a written agreement and culmination of proceedings under Chapter XXC of the Income Tax Act is a pre condition before a suit for specific performance of agreement to sell immovable properties for consideration of more than Rs.10.00 lakhs in Ahmedabad is a condition precedent, on the admitted facts market price on the date of filing of

suit was Rs.15000/- per sq. yard, about more than 250% of consideration pleaded. Written aggrement if any can come into existence only now and disclosing consideration now at the alleged rate of Rs.5961/- will attract the provisions of Chapter XXC inviting presumption of transaction to be to avoid tax, rendering it against public policy. If agreement now to be entered were to be at market price now prevalent, the agreement pleaded cannot be specifically enforced. If no written agreement to sale is executed and registered and filed before competent authority before it is specifically enforced, it will be in contravention of statutory provisions. In either case prima facie there is little likelihood of a decree for specific performance to enforce the oral agreement pleaded, which may result in defeating the provisions of Chapter XXC of Income Tax Act, is remote.

15. In the aforesaid facts and circumstances, when I do not find prima facie a completed oral agreement came into existence as on 24.9.1993, and also that enforcement of such oral agreement as it is will be against public policy in the facts and circumstances of present case, the question of issuing temporary injunction during pendency of the suit must be answered in negative.

In view of my aforesaid conclusion, I do not intend to dwell upon other issues before me about the prima facie case in that regard.

Accordingly, this appeal fails and is hereby dismissed. There shall be no orders as to costs. Interim relief, if any, stands vacated.

No costs.

Civil application shall also stand disposed off.

(Rajesh Balia, J)